In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-900

CITY OF PARMA, OHIO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI, MANDAMUS, OR COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the district court (Pet. App. A-1 to A-2) and the court of appeals (Pet. App. A-3 to A-5) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-3 to A-5) was entered on September 26, 1974. A timely motion for rehearing was denied on November 18, 1974 (Pet. App. A-6). The petition for a writ of certiorari, mandamus, or common law certiorari was filed on January 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 1651(a).

QUESTIONS PRESENTED

1. Whether the dismissal of petitioner's "counterclaim," which requested that the United States be enjoined from further prosecuting this housing discrimination suit, was an appealable order under 28 U.S.C. 1292(a)(1).

2. Whether petitioner's "counterclaim" presents a substantial constitutional question requiring the convention of a three-judge district court.

3. Whether the district court abused its discretion in granting the United States' request for certain protective orders.

STATUTES INVOLVED

The pertinent provisions of 28 U.S.C. 1292 and 42 U.S.C. 3604 and 3613 are set forth at Pet. App. A-7, A-9 to A-10.

STATEMENT

On April 27, 1973, the United States brought an action against petitioner, the City of Parma, Ohio, alleging that petitioner had engaged in a pattern and practice of discrimination in housing, in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, and requesting that petitioner be enjoined from engaging in any discriminatory practice and ordered to eliminate all legal obstacles to equal housing opportunity (Pet. App. A-3 to A-4). Petitioner filed an answer and "counterclaim" and requested the convention of a three-judge court pursuant to 28 U.S.C. 2282. Petitioner's "counterclaim" requested an order declaring the Fair Housing Act unconstitutional as applied and enjoining the United States from enforcing the Act against petitioner (Pet. App. A-4). On February 22, 1974, the district court held that "[a]ny constitutional objections [petitioner] may have to this suit * * * should be raised therein as defenses" (Pet. App. A-1), and that in any event petitioner's counterclaim

presented no substantial constitutional question. Accordingly, the court dismissed the counterclaim and denied the motion to convene a three-judge district court (Pet. App. A-2).

In addition, the district court granted the United States' requests for protective orders in regard to certain discovery matters (Pet. App. A-11). Petitioner had propounded comprehensive interrogatories, which the United States answered in considerable detail. Subsequently, petitioner served notice on the United States to take the depositions of Attorney General William B. Saxbe or his designee; of James T. Lynn, Secretary of the Department of Housing and Urban Development, or his designee; and of former Attorney General Richard G. Kleindienst. The United States moved to limit the scope of the deposition of any designee of Secretary Lynn and to prevent the taking of depositions of Attorney General Saxbe or his designee and of Mr. Kleindienst, principally on the ground that no showing of need had been made to take the depositions of high-ranking officials or of litigating attorneys and that other less burdensome means of discovery were available and had in fact been utilized.

Petitioner appealed from these various pretrial orders. The court of appeals dismissed the appeal for lack of jurisdiction. The court held (Pet. App. A-3 to A-5) that the district court's orders were not appealable as final orders under 28 U.S.C. 1291, that the district court had not granted or refused an injunction so as to confer interlocutory jurisdiction on the court of appeals under 28 U.S.C. 1292(a)(1), and that petitioner had not sought certification of the district court's order under 28 U.S.C. 1292(b).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the district court, by dismissing petitioner's "counterclaim," denied an injunction and thereby entered an interlocutory order appealable under 28 U.S.C. 1292(a)(1). But petitioner's "counterclaim" for injunctive relief was in reality not a counterclaim but merely a defense to the charge of housing discrimination.[1] The declaratory and injunctive relief requested by petitioner was nothing more or less than dismissal of the suit against it. Its "counterclaim" was therefore functionally equivalent to a motion to dismiss. The denial of such a motion is not appealable, whether the motion is made directly or, as here, presented in the guise of a counterclaim. See *Western Geophysical Co. of America, Inc.* v. *Bolt Associates, Inc.*, 463 F.2d 101 (C.A. 2).[2]

The appealability, under 28 U.S.C. 1292(a)(1), of interlocutory orders denying injunctions is an exception to the general rule against piecemeal appeals; accordingly, that provision should be strictly construed. If petitioner were permitted to obtain pretrial appellate review merely by styling its defense as a counterclaim, a broad avenue would be opened to defendants generally by which the rule against piecemeal appeals could be easily circumvented.

2. Petitioner requests (Pet. 14-15) an extraordinary writ of mandamus or common law certiorari to review the district court's refusal to convene a three-judge district court. There is no occasion here for the issuance of an extraordinary writ.

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[1]Moreover, petitioner's asserted constitutional defense has been preserved as petitioner's fifth defense in its answer to the complaint. Thus the dismissal of the "counterclaim" has not impaired petitioner's ability to litigate its constitutional claim before the district court.

[2]Petitioner relies on *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, for the proposition that interlocutory orders denying counterclaims that seek injunctive relief are appealable under 28 U.S.C. 1292(a)(1). However, *General Electric* involved a genuine counterclaim. As the court of appeals held in *Western Geophysical Co. of America* v. *Bolt Associates, supra*, 463 F.2d at 104, a party is not entitled to an exception to the rule against appealing interlocutory orders merely by labelling its defense a counterclaim.

An order denying convention of a three-judge court is not appealable. See *Cancel* v. *Wyman*, 441 F.2d 553 (C.A. 2); *Lyons* v. *Davoren*, 402 F.2d 890 (C.A. 1), certiorari denied, 393 U.S. 1081. There is no reason here to depart from the rule against piecemeal review; petitioner shows no reason why its interests would not be adequately protected by review after a final order. In any event, the refusal to convene a three-judge district court was correct, for petitioner's challenge to the Fair Housing Act raises no substantial constitutional question. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *Williams* v. *The Matthews Co.*, 499 F.2d 819 (C.A. 8), certiorari denied November 18, 1974, Nos. 74-63 and 74-296; *United States* v. *Bob Lawrence Realty, Inc.*, 474 F.2d 115 (C.A. 5), certiorari denied, 414 U.S. 826; *Mayers* v. *Ridley*, 465 F.2d 630 (C.A.D.C.) (*en banc*).

3. Petitioner also requests (Pet. 16-17) that a writ of mandamus issue directing the district court to set aside certain protective orders limiting the scope of petitioner's pretrial discovery.

It is well settled that questions relating to discovery are committed to the sound discretion of the district court and that the court's discovery orders will not be disturbed on appeal in the absence of a clear showing of error. *Baker* v. *F & F Investment*, 470 F.2d 778, 781 (C.A. 2); *Southern Ry. Co.* v. *Lanham*, 403 F.2d 119, 126 (C.A. 5); *Tiedman* v. *American Pigment Corp.*, 253 F.2d 803, 808 (C.A. 4). The protective orders issued here by the district court were proper. The testimony of cabinet officials and persons in comparable positions may not be required in the absence of a strong showing of need. *Wirtz* v. *Local 30, International Union of Operating Engineers*, 34 F.R.D. 13 (S.D. N.Y.); *United States* v. *Northside Realty Associates, Inc.*, 324 F. Supp. 287, 293-295 (N.D. Ga.); *Capitol Vending Co., Inc.* v. *Baker*, 36 F.R.D. 45 (D. D.C.). The same standard applies in regard to the depositions of attorneys litigating a case. *Hickman* v. *Taylor*, 329 U.S. 495, 510-512; *Gajewski* v. *United States*, 321 F.2d 261 (C.A. 8). Petitioner has made no such showing here.

Moreover, this Court has confined the use of the extraordinary writs to exceptional cases presenting issues of unusual public importance. *Ex parte Peru*, 318 U.S. 578. This is not such a case. Furthermore, such writs are particularly inappropriate as mechanisms for reviewing interlocutory discovery orders. *Donnelly* v. *Parker*, 486 F.2d 402, 408 n. 28 (C.A.D.C.). Cf. *Will* v. *United States*, 389 U.S. 90; *Bankers Life and Cas. Co.* v. *Holland*, 346 U.S. 379. And see *International Business Machines Corp.* v. *Edelstein*, 416 U.S. 979; *International Business Machines Corp.* v. *United States*, 416 U.S. 980.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari and the motion for leave to file an alternate petition for a writ of mandamus or common law certiorari should be denied.

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MARCH 1975.